United States Court of Appeals

for the Second Circuit

AMICUS BRIEF

No. 75-1023

United States Court of Appeals
FOR THE SECOND CIRCUIT

B
P/S

UNITED STATES, *Appellee,*

v.

ERNESTO LOPEZ, *Appellant.*

On Appeal from a Judgment of the United States District Court
for the Eastern District of New York

BRIEF OF ASSOCIATION OF IMMIGRATION AND NATIONALITY LAWYERS, AMICUS CURIAE

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BRIEF OF ASSOCIATION OF IMMIGRATION AND NATIONALITY LAWYERS, AMICUS CURIAE

STATEMENT OF INTEREST

The Association of Immigration and National Lawyers is is a national organization chartered under the laws of the State of New York. Its members are attorneys specializing in immigration, naturalization and nationality matters. Our interest in the issues raised by the conviction below prompts us to file this brief.

STATEMENT

Appellant was convicted under 8 U.S.C. 1324(3) for concealing and harboring aliens.

On January 10, 1975 he was sentenced to four years for this offense.

Appellant rented houses and lodging to illegal aliens. The District Court ruled that it was immaterial that appellant did not secrete or hide the aliens involved herein.

ISSUE PRESENTED

Whether failure to establish that a landlord or provider of lodging to illegal aliens secreted or concealed such aliens precludes a conviction under 8 U.S.C. 1324(3).

STATUTE INVOLVED

Section 274 of the Immigration and Nationality Act of 1952 (8 U.S.C. 1324) provides in part:

> "Any person, including the owner, operator, pilot, master, commanding officer, agent, consignee of any means of transportation who
>
> * * * * *
>
> (3) willfully or knowingly conceals, harbors, or shields from detection, in any place, including any building, or means of transportation
>
> * * * * *
>
> any alien including an alien seaman not duly admitted by an immigration officer or not entitled to enter or reside within the United States under

> the terms of this Act or any other law relating to immigration or expulsion of aliens, shall be guilty of a felony *** "

ARGUMENT

I.

HISTORY OF HARBORING SECTION OF IMMIGRATION LAWS

Section 6 of the Act of March 3, 1891 (26 Stat. 1084) punished as a misdemeanor those who brought in or aided in landing "any alien not lawfully entitled to enter the United States."

Section 8 of the Act of March 3, 1903 (32 Stat. 1213) punished as a misdemeanor any person including "the master, agent or consignee of any vessel, who shall bring into or land in the United States by vessel or otherwise . . . any alien not duly admitted by an immigrant inspector or not lawfully entitled to enter the United States."

Section 5 of the Act of February 20, 1907 (34 Stat. 898) continued the provisions of the 1903 statute.

On February 20, 1917 (39 Stat. 874) Section 8 was amended to provide:

> "That any person including the master, agent, owner, or consignee or any vessel, who shall bring into or land in the United States, by vessel or otherwise, or shall attempt, by himself or through another, to bring into or land in the United States, by vessel or otherwise, or shall conceal or harbor, or attempt to conceal or harbor, or assist or abet another to conceal or

> or assist or abet another to conceal or harbor in any place, including any building, vessel, railway car, conveyance, or vehicle, any alien not duly admitted by an immigrant inspector or not lawfully entitled to enter to to reside within the United States under the terms of this Act, shall be deemed builty of a felony and upon conviction shall be punsihed by a fine not exceeding $2000 and by imprisonment for a term not exceeding five years for each and every alien so landed or brought in."

Senate Report 355, p. 8, 63rd Cong. 2d Sess. states the purpose of the 1917 amendment as follows:

> "This is based upon section 8 of the existing law, and such new provisions as are included are merely to complete the definition of the crime of smuggling of aliens into the United States and related offenses, and to meet the various court decisions showing that the present law is not sufficiently explicit."

United States v. Evans, 333 U.S. 48 (1948) ruled that Congress had failed to provide a penalty for the concealing and harboring section of the statute. This led to an amendment on March 20, 1952 (Public Law 283, 82d Cong. 2d Sess., 66 Stat. 26) whose purpose was "to overcome the deficiency in the present law by making it an offense to harbor or conceal aliens who have entered this country illegally ***" *House Report 1377*, 82d Cong. 2d Sess; *Senate Report 1145*, 82d Cong. 2d Sess.; 2 *U.S. Cong. Code* p. 1358, 82d Cong. 2d Sess. The statute was amended to read:

"Sec. 8(a) Any person, including the owner, operator, pilot, master, commanding officer, agent, consignee of any means of transportation who–

* * * * *

(3) willfully or knowingly conceals, harbors, or shields from detection, in any place, including any building or any means of transportation

* * * * *

any alien including an alien seaman not duly admitted by an immigration officer or not lawfully entitled to enter or reside within the United States under the terms of this Act or any other law relating to immigration or expulsion of aliens, shall be guilty of a felony *** "

It was subsequently reenacted in the same form as Section 274 of the Immigration and Nationality Act of 1952 (66 Stat. 163; 8 U.S.C. 1324).

House Report 1365, p. 68, 82d Cong. 2d Sess. states that the purpose of the statute was to amend the law in the light of *United States v. Evans,* 333 U.S. 483 (1948) and to provide that employment including the usual and normal practice incident to employment did not constitute harboring.

A December 20, 1957 analysis by the General Counsel of the Immigration and Naturalization Service of the bills which became the Immigration and Naturalization Act of 1952 states with reference to Section 274 (8 U.S.C. 1324):

> "This section is designed to replace section 8 of the Immigration Act of 1917. It deals with criminal penalties against persons who bring into or land in the United States or attempt to do so, or who conceal or harbor or attempt to do so, aliens who are not duly admitted by immigration officers or who are not lawfully entitled to enter or reside in this country. The penalty of maximum imprisonment of five years and fine of $2000 for each violation is proposed."
>
> (The foregoing analysis is on file in the Supreme Court Library.)

Throughout the foregoing legislative history and amendments, no attempt was made to define the limits of the word "harbor."

II.

"HARBOR" HAD A WELL DEFINED MEANING OF SECRETION AT THE TIME OF ENACTMENT OF THE IMMIGRATION STATUTE

Prior to the enactment of immigration legislation punishing the harboring of aliens, the term harbor had a well defined meaning importing clandestine action or secreting of the body of the individual involved.

Jones v. Van Zandt, 5 How. 215, 227, 12 L.Ed. 122, 128 (1847) was one of the earliest cases involving construction of the word "harbor." It involved a civil penalty action brought under a 1793 statute (1 Stat. 302) for concealing and harboring a fugitive slave. The Court observed:

> "Indeed, the general definition of the word 'harbor' in 1 Bouvier 460 as quoted by the defendant's counsel say nothing as to the authority of that work - is such as to be fully covered by the facts in this case as stated in the record and as found by the jury. It is 'to receive clandestinely, and without lawful authority, a person *for the purpose of concealing* him, so that another, having the right to the lawful custody of such person, shall be deprived of the same.' " (Emphasis supplied.)

Firpo v. United States, 261 F. 850, 853 (2d Cir., 1919) involved harboring of a deserter contrary to 18 U.S.C. 94 (now 18 U.S.C. 1381). Both the majority and dissenting opinions concurred in holding that harboring meant to lodge or care for the deserter after secreting him.

United States v. Shapiro, 113 F.2d 891 (2d Cir., 1940) reaffirmed the *Firpo* principle and applied it to 18 U.S.C. 246 (now 18 U.S.C. 1071) involving harboring of those sought upon federal warrants of arrest. See also: *United States v. Foy,* 416 F.2d 940 (7th Cir., 1969); *United States v. Thornton,* 178 F. Supp. 42, 43 (D.C.E.D.N.Y. 1959)

III.

HARBORING UNDER 8 U.S.C. 1324 AND ITS PREDECESSOR STATUTE 8 U.S.C. 144 REQUIRES SECRETION BY THE OFFENDER

In one of the earliest cases under 8 U.S.C. 144 (Section 8 of the 1917 Act) *Susnjar v. United States,* 27 F.2d 223, 224 (6th Cir. 1928) it was said:

> "When taken in connection with the purposes of the act, we conceive the natural meaning of the word 'harbor' to be to clandestinely shelter, succor, and protect improperly admitted aliens, and the word 'conceal' should be taken in the simple sense of shielding from observation and preventing discovery of such alien persons. There seems to be nothing unnatural or strained in this interpretation of the meaning of these words, when thought of in connection with the object and purposes of the act."

The principle of the *Susnjar* case was approved by this Court in *United States v. Shapiro,* 113 F.2d 891 (2d Cir., 1940) and *United States v. Smith,* 112 F.2d 83 (2d Cir., 1940).

United States v. Smith, supra, involved a conviction under 8 U.S.C. 144 for harboring alien prostitutes. Judge Clark speaking for this Court said:

> "But 'harbor' in the context of the statute - 'conceal or harbor * * * any alien not duly admitted by an immigrant inspector or not lawfully entitled to enter or to reside within the United States' means only that the girls shall be sheltered from the immigration authorities and shielded from observation to prevent their discovery as aliens. *Susnjar v. United States,* 6 Cir. 27 F.2d 223. This they certainly were. Appellant told them to reveal to no one that they were Canadians * * * *."

In *United States v. Mack,* 112 F.2d 290, 291 (2d Cir., 1940) Judge Learned Hand said:

> " 'harboring' an alien was certainly not proved, for there can be no doubt that here knowledge

> of alienage is an element. It would be shocking to hold guilty anyone who gave shelter to an alien whom he supposed to be a citizen; and besides the statute is plainly directed against those who abet evaders or the law against unlawful entry, as the collocation of 'conceal' and harbor shows. Indeed, the word, 'harbor' alone often connotes surreptitious concealment."

In the light of these decisions and the background of the statutes, *2 Gordon and Rosenfield,* Immigration Law and Practice, p. 9-55 (1974) states:

> "Although the harboring offense primarily relates to smuggling, its reach obviously extends beyond the smuggling operation. Any person who willfully or knowingly harbors an illegal entrant may violate this section. *Harboring means clandestine or surreptitious concealment.*" (Emphasis supplied.)

IV.

PRINCIPLES OF STATUTORY CONSTRUCTION REQUIRE INTERPRETATION OF "HARBOR" TO MEAN SURREPTITIOUS CONCEALMENT

Obviously the word 'harbor' can mean shelter without surreptitious concealment as the dicta in *Herrera v. United States,* 208 F.2d 215 (9th Cir., 1953) note 4, cert. denied 347 U.S. 927 observes or it can require concealment. Several principles of statutory construction favor the latter construction.

1. The statute should be strictly construed and ambiguity - if this be the case - concerning the ambit of a criminal statute should be resolved in favor of lenity.

United States v. Enmons, 410 U.S. 396, 411 (1973); *Rewis v. United States*, 401 U.S. 808, 812 (1971); *Bell v. United States*, 349 U.S. 81, 83 (1955).

2. The statute using "harbor" in the context of "conceal" and "shield from detection" should be interpreted under the ejusdem generis rule as being confined to the class which is specifically described. *Cleveland v. United States*, 329 U.S. 14 (1946). This class consists of those clandestinely shielded from detection by the Immigration Service.

3. The contemporaneous administrative interpretation of the statute is that reflected in *Gordon & Rosenfield, supra*, written by Charles Gordon, former General Counsel of the Immigration and Naturalization Service. That interpretation is entitled to great weight. *Zuber v. Allen*, 396 U.S. 168, 192 (1969); *Udall v. Tallman*, 380 U.S. 1, 16 (1965); *United States v. American Trucking Associations*, 310 U.S. 534, 549 (1940). This isolated prosecution is the first since 1953 seeking to sustain a conviction for non-surreptitious harboring. It is contrary to long standing administrative practice and should not be sustained.

CONCLUSION

For the reasons set forth above, the conviction below should be reversed.

Respectfully submitted,

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ERNESTO LOPEZ,	:	
Appellant	:	

CERTIFICATE OF SERVICE

I hereby certify that two copies of the Brief of the Association of Immigration and Nationality Lawyers, Amicus Curiae, were mailed, postage prepaid, this 27th day of February, 1975, to Paul Corcoran, Assistant United States Attorney for the Eastern District of New York, 225 Cadman Plaza East, Brooklyn, New York 11201.

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